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Nos. 93-1748, 93-1757

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LILLIAN SOLOMON, *et al.*,
Petitioners,
v.
RESOLUTION TRUST CORPORATION, as Receiver for Nassau Savings and Loan Association, F.A.,
Respondent.

SUSAN SOLOMON PATTULLO, *et al.*,
Petitioners,
v.
RESOLUTION TRUST CORPORATION, as Receiver for Nassau Savings and Loan Association, F.A.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF LEGAL SERVICES FOR NEW YORK CITY, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

BRIEF OF
LEGAL SERVICES FOR NEW YORK CITY, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

With written consent of petitioners and respondent, filed concurrently herewith, Legal Services for New York City Housing Task Force, together with the Legal Aid Society, Northern Manhattan Improvement Corporation, The Association for Neighborhood and Housing Development, Neighborhood Initiatives Development Corporation, The West Side SRO Law Project, The Community Service Society of New York, Inc., Metropolitan Council on Housing, New York State Tenant & Neighborhood Coalition Inc., Center for Constitutional Rights, The City-Wide Task Force on Housing Court, Inc., and Community Training and

Resource Center, Inc., submit this brief as *Amici Curiae* in support of the Petitions of Lillian Solomon, et al. and Susan Solomon Pattullo, et al. for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

INTEREST OF *AMICI CURIAE*

Amici here are all legal services and other public interest groups that have grave concerns regarding the potentially far-reaching and adverse practical effects of the Second Circuit's decision below. Specifically, under the Second Circuit's overly broad interpretation of 12 U.S.C. § 1821(e) ("Section 1821(e)"), *Amici* fear that *all* rent-regulated tenants nationwide will be placed at risk of future repudiation and eviction. *Amici* are especially concerned for rent-regulated tenants of low and moderate means who are not protected under the Second Circuit's decision.

The Legal Services for New York City (LSNY) Housing Task Force is composed of attorneys and advocates from seventeen neighborhood-based legal services offices which provide free legal services to low-income tenants faced with eviction in New York City Housing Court. It is dedicated to the protection of the constitutional and statutory rights of low-income tenants and thus is concerned with the outcome of this case.

The Legal Aid Society is one of the oldest and largest providers of legal assistance to the poor in the United States. The Society is counsel in numerous class-action cases concerning the rights of tenants and homeless families in New York City. Accordingly, the Society has a substantial interest in this case.

Northern Manhattan Improvement Corporation (NMIC) provides free legal services in housing matters to residents of the Washington Heights and Inwood neighborhoods of New York City. Ninety-five percent of NMIC's clients live in rent-regulated housing, and a number of buildings in the communities served by NMIC have been taken over by Resolution Trust Corporation ("RTC"). NMIC is therefore concerned with the impact of RTC takeovers on rent-regulated housing.

The Association for Neighborhood and Housing Development (ANHD) is a membership organization of seventy-five not-for-profit neighborhood-based organizations which preserve and

protect housing for low-income people in New York City. ANHD is concerned with the threat to housing affordability posed by the decision in this case.

Neighborhood Initiatives Development Corporation (NIDC) is a non-profit community organization which works with tenants, co-op shareholders, and property owners to improve housing conditions and maintain a stable neighborhood in the area encompassed by Bronx Community Board #11 in New York City. Several years ago, there was a wave of co-op conversions in this community. A number of those co-ops are now in default. One four-building complex consisting of over 300 units has been taken over by RTC. This complex has tremendous financial problems and would be a prime candidate for tenant evictions if RTC were to consider only the financial health of the building and the interest of the government in recouping lost investments. Therefore, RTC's right to evict tenants as a result of the Second Circuit's opinion in this case causes NIDC great concern.

The West Side SRO Law Project was founded by the City of New York in 1981 to preserve both single-room occupancy (SRO) apartments and SRO tenancies, and to advocate for law and policy which would enhance these efforts. The integrity of the rent regulation system is vital to the organization's efforts, and, accordingly, the Law Project has a significant interest in the issues and outcome of this case.

The Community Service Society of New York, Inc., works cooperatively with community-based organizations and other social policy and advocacy groups to fight poverty through research, advocacy, community development, and direct service. Through its activities, the Society has promoted and increased the affordable housing stock for poor and homeless families in New York City and has used legal intervention to protect the rights of poor tenants in the City. The Second Circuit's decision below could damage the overall efforts and goals of the Society. Thus, the organization has a significant interest in the outcome of this case.

Metropolitan Council on Housing is a New York City-wide tenant organization dedicated to decent, affordable, and integrated housing. Because the tenant rights for which Metropolitan Council advocates would clearly be threatened if federal agencies were

able to pre-empt state laws that secure those rights, it has a significant interest in the disposition of this case.

The New York State Tenant and Neighborhood Coalition Inc. (NYSTNC), is a state-wide tenant rights lobbying and advocacy membership organization. The organization lobbies the New York State legislature on laws affecting tenants' rights and protections, the allocation of funds for the production of affordable housing, and the preservation of existing housing. NYSTNC therefore has a substantial interest in this case.

The Center for Constitutional Rights (CCR) is a non-profit legal and educational organization dedicated to protecting and advancing the rights guaranteed by the Constitution of the United States and the Universal Declaration of Human Rights. In more than two decades since its founding, CCR has participated, either directly or as *amicus*, in a number of cases involving housing issues. CCR is seriously concerned with the long-range impact of the Second Circuit's decision below, and thus has a significant interest in the disposition of this case.

The City-Wide Task Force on Housing Court, Inc., formed in 1981, is a not-for-profit coalition of community organizations, legal services providers and neighborhood housing advocates committed to improving the administration of justice for unrepresented litigants in New York City's housing court. In addition to providing information and referral services to thousands of unrepresented tenants each year, the Task Force monitors court operations and issues recommendations for court reform. The Task Force is concerned by the decision in this case because, if permitted to stand, such decision is certain to impact the client population served by this organization.

Community Training and Resource Center, Inc. (CTRC), founded as a not-for-profit corporation in 1982, works to improve conditions for lower income tenants and neighborhoods in New York City. Specifically, CTRC organizes neighborhood housing groups into city-wide coalitions that advocate for budgetary and policy reforms that benefit lower income New York City renters. CTRC is concerned with the ultimate resolution of this case because it will have a profound effect on the constituents served by CTRC.

ARGUMENT

I.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER SETTLED STATE LAW MAY BE DISREGARDED IN DECIDING WHETHER STATUTORY TENANCIES ARE SUBJECT TO REPUDIATION UNDER 12 U.S.C. § 1821(e)

The question presented by the Petitions in this case is whether RTC's authorization to "disaffirm or repudiate any contract or lease" that it, in its discretion, "determines to be burdensome," pursuant to Section 1821(e) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), includes the power to repudiate statutory tenancies created and continued by virtue of state and local law.

In the decision below, the Second Circuit held that repudiation of statutory tenancies was expressly authorized by Section 1821(e). *See RTC v. Diamond*, 18 F.3d 111, 121-22 (2d Cir. 1994). Finding that "the definition of the phrase 'contract or lease' is a matter of federal law," *id.* at 118, the court concluded "that New York's statutory tenancies -- whether under rent stabilization or rent control -- are contract-based leaseholds" and thus "fall within the express language of § 1821(e)." *Id.* at 121. In so holding, the Second Circuit completely ignored a long and unbroken line of authority clearly establishing that, as a matter of New York law, the obligations created by statutory tenancies are *not* contractual in nature and, in fact, cannot even be altered by contract, lease, or agreement.[1]

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[1] *See, e.g., Whitmarsh v. Farnell*, 83 N.E.2d 543 (N.Y. 1949); *Stern v. Equitable Trust Co.*, 144 N.E. 578 (N.Y. 1924); *De Santis v. White Rose Assocs.*, 578 N.Y.S.2d 363 (Sup. Ct. 1991); *Park Summit Realty Corp. v. Frank*, 434 N.Y.S.2d 73 (App. Term 1980), *aff'd*, 448 N.Y.S.2d 414 (App. Div. 1981), *aff'd*, 439 N.E.2d 358 (1982); *Charlotte Realty Co. v. Lubarsky*, 509 N.Y.S.2d 691 (App. Term 1986). Although the Second Circuit purported to "defer to state court's pronouncements regarding the definition of property interests," *RTC*, 18 F.3d at 118, it did not in fact do so. None of the New York cases cited by the court conflict with, nor even bear upon, the settled New York holdings that statutory tenancies are not contractual in nature. *See id.* at 120.

Because its decision to disregard state law: (i) is inconsistent with the decisional law of this Court; and (ii) creates conflicts among the circuit courts regarding the interpretation of similar statutory provisions, this Court's review of the Second Circuit's decision is plainly warranted.

A. The Second Circuit's Decision Conflicts With This Court's Well-Settled Principles Of Statutory Construction

This Court has repeatedly held that, in interpreting federal legislation, there is a strong presumption against the preemption of state and common law. *United States v. Texas*, 113 S. Ct. 1631, 1634 (1993); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This is especially true where the historic police powers of the states are implicated. *See, e.g., Cipollone v. Liggett Group*, 112 S. Ct. 2608, 2617 (1992).[2] In addition, the Court has held that longstanding concepts of state law should be utilized whenever possible to define terms and fill interstices in federal legislation. *See, e.g., Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98, 101-08 (1991); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29, 739-40 (1979); *Butner v. United States*, 440 U.S. 48, 54 (1979); *RFC v. Beaver County*, 328 U.S. 204, 210 (1946).

These well-established principles were recently reaffirmed by the Court in *BFP v. RTC*, 114 S. Ct. 1757 (1994). There, in the context of interpreting Section 548 of the Bankruptcy Code, 11 U.S.C. § 548, the Court expressly refused to attach any special "federal law" meaning to the phrase "reasonably equivalent value." In so holding, the Court noted:

> It is beyond question that an essential state interest is at issue here: we have said that "the general welfare of

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[2] It is beyond cavil that local regulation of the landlord-tenant relationship, including the adoption of rent control ordinances, is within the traditional police powers of the states. *See, e.g., Yee v. City of Escondido*, 112 S. Ct. 1522, 1529 (1992); *Pennell v. City of San Jose*, 485 U.S. 1, 12 & n.6 (1988); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982); *Bowles v. Willingham*, 321 U.S. 503, 517-18 (1944); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 245 (1922); *Block v. Hirsh*, 256 U.S. 135, 155-57 (1921).

> society is involved in the security of titles to real estate" and the power to ensure that security "inheres in the very nature of [state] government." *American Land Co. v. Zeiss*, 219 U.S. 47, 60 (1911). Nor is there any doubt that the interpretation urged by petitioner would have a profound effect upon that interest: the title of every piece of realty purchased at foreclosure would be under a federally created cloud. . . . To displace traditional State regulation in such a manner, the federal statutory purpose must be "clear and manifest," *English v. General Electric Co.*, 496 U.S. 72, 79 (1990). *Cf. Gregory v. Ashcroft*, [111 S. Ct. 2395, 2401 (1991)]. Otherwise the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law. *See Kelly* [*v. Robinson*, 479 U.S. 36, 49 (1986)]; *Butner v. United States*, 440 U.S. 48, 54-55 (1979); *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 171 (1946) (Frankfurter, J., concurring).

Id. at 1764-65. "[A]bsent clearer textual guidance," the Court would not presume that Congress intended to create an exception to longstanding principles of state regulation touching on the essential sovereign interest in the security and interest in title to land. *Id.*

Similarly, in *O'Melveny & Myers v. FDIC*, 62 U.S.L.W. 4487 (U.S. June 13, 1994), a recent case in which this Court was called upon to interpret a provision of FIRREA, the Court expressly noted that "matters left unaddressed [by FIRREA] are presumably left subject to the disposition provided by state law." *Id.* at 4489. Although FIRREA contains numerous definitions, *see* 12 U.S.C. § 1813, the statutory scheme has "left unaddressed" what constitutes a "contract or lease." Thus, the Court's decision in *O'Melveny* also confirms that state law should supply the definition of the terms "contract or lease."[3]

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[3] The Court in *O'Melveny* also specifically rejected the notion that "more money" arguments made by government agencies should inform a judicial interpretation of the FDIC's or RTC's powers. In the case below, however, the

(continued...)

The Second Circuit's decision to ignore New York state law in construing Section 1821(e) cannot be reconciled with these precedents. Indeed, because the decision below squarely conflicts with the principles espoused in two of the Court's most recent decisions (*BFP* and *O'Melveny*), certiorari should be granted, the Second Circuit's decision vacated, and the case remanded for this reason alone.

B. The Second Circuit's Decision Creates Interpretational Conflicts Among The Circuit Courts

The decision of the Court of Appeals below also conflicts with a number of circuit court opinions that faithfully have applied this Court's jurisprudence in interpreting statutory provisions similar to Section 1821(e).

At least two circuit courts have held that state law should determine what legal interests fall within the terms "contract" or "lease" under the repudiation provision of Section 365(a) of the Bankruptcy Code, 11 U.S.C. § 365(a). *See In re Topco, Inc.*, 894 F.2d 727, 739 n.17 (5th Cir. 1990); *In re Streets & Beard Farm Partnership*, 882 F.2d 233, 235 (7th Cir. 1989). Moreover, two other federal courts of appeal have squarely held that obligations created by state and local rent control ordinances and housing laws are *not* obligations imposed by the words "contract" or "lease" within the meaning of the federal Bankruptcy Code. *See In re Chicago, Rock Island & Pac. R.R.*, 772 F.2d 299, 302-03 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986); *Saravia v. 1736 18th St., N.W., Ltd.*, 844 F.2d 823, 827 (D.C. Cir. 1988).[4]

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[3](...continued)

Second Circuit expressly adopted RTC's "more money" arguments, and stated that its interpretation of RTC's powers was designed "to strengthen RTC's hand in remedying a national economic emergency." *RTC*, 18 F.3d at 123.

[4] *See also In re Friarton Estates Corp.*, 65 B.R. 586, 592-93 (Bankr. S.D.N.Y. 1986) (utilizing state law to determine that a New York statutory tenancy is not a "contract" or a "lease" within the meaning of Section 365(a) of The Bankruptcy Code, 11 U.S.C. § 365(a)). The Second Circuit's attempt to distinguish *Friarton* on the basis of the Bankruptcy Code's allowance for the "renewal or extension" of leases in accordance with "applicable non-bankruptcy law," *RTC*, 18 F.3d at 122, ignores the *Friarton* court's specific and express

(continued...)

These decisions obviously conflict with the Second Circuit's decision in this case which opted to create a "federal law" definition of "contract" or "lease" which included statutory tenancies.

The decision below also conflicts with the decisions of two other federal circuit courts holding that the term "agreement" -- a virtually indistinguishable and similarly undefined statutory term found in FIRREA -- does not include obligations imposed by state law on parties to a relationship initiated by contract. *See Bateman v. FDIC*, 970 F.2d 924, 928 (1st Cir. 1992); *Patterson v. FDIC*, 918 F.2d 540, 543-45 (5th Cir. 1990).

II.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE SECOND CIRCUIT'S CONSTRUCTION OF 12 U.S.C. § 1821(e) IS PERMISSIBLE IN LIGHT OF THE SERIOUS CONSTITUTIONAL ISSUES THAT SUCH CONSTRUCTION RAISES UNDER THE TAKINGS CLAUSE

It is a "familiar principle" of this Court's jurisprudence that federal courts should "not pass on the constitutionality of an Act of Congress if a construction of the Act is fairly possible by which the constitutional question can be avoided." *Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2465 (1993) (citing *United States v. Locke*, 471 U.S. 84, 92 (1985)). Thus, where, as here, there is substantial doubt as to whether respondent's requested interpretation of Section 1821(e) comports with the Takings Clause of the Fifth Amendment, the Second Circuit should have declined "'to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive [constitutional] questions.'" *United States v. Security Indus. Bank*, 459 U.S. 70, 82 (1982) (quoting *NLRB v. Catholic Bishop*, 440 U.S. 490, 507 (1979)). The Second Circuit's failure to adhere to this settled principle of statutory construction, by simply declaring

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[4](...continued)

reliance on state law in examining whether statutory tenancies are within the meaning of "contract" or "lease."

statutory tenancies outside the scope of Section 1821(e), warrants this Court's review.[5]

A. Statutory Tenancies Are Protectable Property Interests

The Second Circuit briefly considered, and then summarily rejected, petitioners' argument that repudiation of statutory tenancies would constitute a taking without just compensation in violation of the Fifth Amendment of the Constitution. Specifically, the court held that because each of the tenant petitioners had the option of remaining in possession of their respective apartments "through the end of the tenancy's term . . .[,] nothing is being 'taken.'" *RTC v. Diamond*, 18 F.3d 111, 125 (2d Cir. 1994).[6] A state-created interest in a statutory tenancy, however, is clearly a protectable property interest for as long as possession is authorized by state law (regardless of the tenancy term set forth in any written lease). Accordingly, the Second Circuit's holding on the constitutional "takings" issue does not withstand scrutiny.

It is well-settled that tenancy interests are property interests protected by the Fifth Amendment. *See, e.g., Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 303 (1976); *United States v.*

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[5] While *Amici* recognize that a number of lower courts have specifically upheld Section 1821(e) against attacks under the Takings Clause, all of these cases involved the repudiation of actual contracts; none dealt with the repudiation of a statutorily created property interest. *See Unisys Finance Corp. v. RTC*, 979 F.2d 609 (7th Cir. 1992); *Atlantic Mechanical, Inc. v. RTC*, No. 91-1500, 1992 U.S. App. LEXIS 904 (4th Cir. Jan. 27, 1992); *Fleet Nat'l Bank v. FDIC*, 843 F. Supp. 787 (D. Mass. 1994); *Pageland 29 Ltd. v. FDIC*, No. 91-1858-LFO, 1992 U.S. Dist. LEXIS 19231 (D.D.C. Dec. 14, 1992); *LB Credit Corp. v. RTC*, 796 F. Supp. 358 (N.D. Ill. 1992); *FDIC v. Cobblestone Corp.*, No. 91-12741-Z, 1992 U.S. Dist. LEXIS 17024 (D. Mass. Oct. 28, 1992). While a simple breach of contract may not rise to the level of an unconstitutional taking, the elimination of a statutorily created tenancy interest in real property surely does.

[6] The Second Circuit also held that repudiation of statutory tenancies could not constitute an unconstitutional "taking" because such repudiations were "expressly authorize[d]" by Section 1821(e). *RTC*, 18 F.3d at 125. It is hornbook law, however, that an activity that is otherwise unconstitutional does not suddenly become constitutional merely because it is authorized by statute. *See, e.g., Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) ("[i]t is clear, of course, that no act of Congress can authorize a violation of the Constitution").

Petty Motor Co., 327 U.S. 372, 373 (1946); *A.W. Duckett & Co. v. United States*, 266 U.S. 149, 151 (1924).[7] The nature of the property interest, and its duration, is determined according to the terms of any lease that may exist between the landlord and the tenant, *as well as by the provisions of state law. See Petty Motor Co.*, 327 U.S. at 376 (where lease had automatic termination provision, and "*in the absence of a contrary state rule*," tenant had no right which persisted beyond the taking and thus was entitled to no compensation) (emphasis added); *Berrios v. City of Lancaster*, 798 F. Supp. 1153, 1157 (E.D. Pa. 1992) ("[a] leasehold interest . . . is a property interest under Pennsylvania law, as . . . defined and created by . . . the terms of the lease contract, *and the Pennsylvania Landlord and Tenant Act of 1951*") (emphasis added) (citations omitted). Thus, even where a lease would have expired under its own terms, or would otherwise have been terminated, the tenancy remains a compensable property interest for as long as continued possession would be permitted under state law. *See, e.g., Petty Motor Co.*, 327 U.S. at 380 (in the case of tenancies at will, determination of the remainder of the term will depend upon the requirements of state law as to notice for termination of such tenancies).

Thus, New York, through its local rent control and rent stabilization ordinances, has clearly created a compensable property interest of indefinite duration.[8] As long as the conditions

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[7] *Accord Ward v. Downtown Dev. Auth.*, 786 F.2d 1526, 1529 (11th Cir. 1986) ("any tenancy, no matter the duration, is a property interest that can be the subject of a compensable taking"); *Devines v. Maier*, 665 F.2d 138, 141 (7th Cir. 1981) ("leasehold interests are property interests protected by the Fifth Amendment"); *Berrios v. City of Lancaster*, 798 F. Supp. 1153, 1157 (E.D. Pa. 1992) (leasehold interests are property interests that cannot be taken without just compensation).

[8] The property interest created by state and local law is conditioned on a number of factors, primarily: (i) the tenant's continuing payment of the legally prescribed rent; and (ii) the local legislature's continuing determination that a local housing emergency exists. Otherwise, tenants of rent-controlled and rent-stabilized apartments are only subject to eviction on grounds specifically set forth in the rent regulation laws, such as, among other things, a breach of a substantial obligation of the tenancy, commission of a nuisance, illegal occupancy, or refusal

(continued...)

set forth in New York's statutory scheme are met, the rent-controlled or rent-stabilized tenant may not be evicted, and his or her right to possession of, and therefore his or her property interest in, the statutory tenancy continues. *Cf. McCue Bros. & Drummond, Inc. v. Commissioner*, 19 T.C. 667, 671 (1953) ("[i]n view of the numerous authorities examined, including the cases cited, we are convinced that the statutory right of possession, use, and occupancy which the petitioner had in the store premises under the emergency laws was a property right. . . . This right petitioner held first under the lease and later under the emergency rent control statute"), *aff'd*, 210 F.2d 752 (2d Cir.), *cert. denied*, 348 U.S. 829 (1954).[9]

B. Repudiation Of Statutory Tenancies Without Just Compensation Would Constitute An Unconstitutional Per Se Physical Taking Of Petitioners' Property Interests

Cases interpreting the Takings Clause of the Fifth Amendment generally fall within two distinct classes -- those involving physical takings and those involving regulatory takings. "Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation." *Yee v. City of Escondido*, 112 S. Ct. 1522, 1526 (1992); *accord Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Such physical occupations by the

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[8](...continued)

to provide reasonable access. *See generally* N.Y.C. Admin. Code § 26-408, reported following N.Y. Unconsol. Law § 8617 (McKinney 1987); N.Y.C. Admin. Code § 26-511 and NYCRR Part 2524. Because a property interest created by state and local law is, from its inception, conditioned upon the continuing "consent" of the legislature, revocation of such "consent" could not, of course, itself constitute a taking.

[9] Similar property interests created by state law have routinely been deemed protected by the Takings Clause of the Fifth and Fourteenth Amendments. *See, e.g., Armstrong v. United States*, 364 U.S. 40, 46 (1960) (materialman's lien which attached by virtue of state law constituted a compensable property interest protected by the Fifth Amendment); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601-02 (1935) (secured interest in mortgaged property under state law could not be "taken even for a wholly public use without just compensation").

government have come to be recognized as "*per se*" physical takings "for which compensation *must* be paid." *FCC v. Florida Power Corp.*, 480 U.S. 245, 250 (1987) (emphasis added).

The Second Circuit's decision below interpreting Section 1821(e) of FIRREA to permit the eviction of rent-regulated tenants from their statutory tenancies constitutes a classic example of a *per se* physical taking. The government, through respondent here, is not only compelling petitioners to accede to a physical occupation of their apartments, but is actually seeking to eliminate, through eviction, the totality of petitioners' state-created property interests in the rental units. Where, as here, "the Government actually [takes] the leaseholds of the tenants . . . or . . . destroy[s] the tenants' right of occupancy," there is "a complete taking of the entire interest of the tenants in the property" and compensation is required. *Petty Motor Co.*, 327 U.S. at 378; *see also Devines*, 665 F.2d at 142 ("the tenant whose right to occupy the premises is extinguished has nothing left and the impact of the regulation on his rights could not be more severe").

C. At The Very Least, Repudiation Of Statutory Tenancies Without Just Compensation Would Constitute An Impermissible Regulatory Taking Of Petitioners' Property Interests

The second class of "takings" recognized by this Court's jurisprudence are generally termed "regulatory takings." Unlike physical takings, not every regulation of property rises to the level of an unconstitutional taking. Rather, "where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." *Yee*, 112 S. Ct. at 1526 (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-25 (1978)).

While the Court has "eschewed the development of any set formula," it has "identified three factors which [it deems to] have 'particular significance'" in evaluating whether governmental regulation of property constitutes a "taking." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-25 (1986). These are:

"(1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'" *Id.* at 224-25 (quoting *Penn Cent.*, 438 U.S. at 124). Here, each of these three factors supports the conclusion that eviction from statutory tenancies constitutes an unconstitutional "taking" without just compensation.

First, the economic impact of the Second Circuit's decision on petitioners will obviously be substantial. Not only will petitioners have to bear significant costs as a result of their forced removal and relocation from their current apartments; petitioners must seek alternative rental housing in a New York City housing market that has again recently been found by the local legislature to be in a continuing "state of emergency."[10] Moreover, to the extent the Second Circuit's decision is ultimately applied to low-income and moderate-income rent-controlled tenants (as discussed *infra*), repudiation and eviction pursuant to Section 1821(e) could have an economically and socially devastating impact on thousands of tenants not only in New York City, but nationwide. *Cf. Pennell v. City of San Jose*, 485 U.S. 1, 14 n.8 (1988) ("[p]articularly during a housing shortage, the social costs of the dislocation of low-income tenants can be severe").

Second, the repudiation of petitioners' statutory tenancies interferes greatly with their "investment-backed expectations." One need look no further than the factual illustration provided in Lillian Solomon's Petition for Certiorari in this case to see that this is so. In declining to purchase cooperative shares relating to her unit when her building's owner converted the apartments to cooperative ownership in 1983, Mrs. Solomon, who is now over 90 years old, specifically relied on the representation made to her pursuant to New York law that her rights as a protected tenant would remain undisturbed. *See* Petition for a Writ of Certiorari at 6, *Solomon v. RTC*, (May 4, 1994). Mrs. Solomon's reliance on her expectation of continued occupancy rights in accordance

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[10] *See* McKinney's *Session Laws*, L. 1993, c. 253 (declaring an emergency in housing in certain parts of the state, readopting the rent regulatory enabling laws, and extending them to June 15, 1997).

with New York's state and local law, in deciding not to invest money to buy cooperative shares, is precisely the type of state law reliance interest that this Court has routinely sought to protect.[11]

Finally, there can be no doubt that the character of the governmental action here weighs heavily in favor of a finding that the federal government, through RTC, is effecting an unconstitutional "taking" of private property interests without just compensation. Specifically, under the Second Circuit's and RTC's interpretation of Section 1821(e), one particular group of citizens (namely, those citizens who occupy rent-regulated housing) is being asked to bear public burdens (namely, the forfeiture of valuable property interests in their homes to help mitigate the adverse effects of a nationwide savings and loan crisis) "which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). In such circumstances, the requested interpretation of Section 1821(e) does not comport with the requirements of the United States Constitution, and thus should not be permitted to stand.

III.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE SECOND CIRCUIT ERRED BY COMPLETELY OVERLOOKING THE SIGNIFICANT AND ADVERSE EFFECTS THAT ITS OVERLY BROAD RATIONALE MAY HAVE ON RENT-REGULATED TENANTS NATIONWIDE

The Second Circuit's decision holding that the repudiation of statutory tenancies is properly authorized by Section 1821(e) threatens to obliterate not only the continuing viability of New

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[11] *Cf. Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991) (finding reasons for adopting state law "particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards"); *United States v. Brosnan*, 363 U.S. 237, 241-42 (1960) (declining to formulate a "federal law" rule governing divestiture of federal tax liens where federal legislation implicated "area of complex property relationships long since settled and regulated by state law" and where "the need for uniformity in this instance is outweighed by the severe dislocation to local property relationships which would result from our disregarding state procedures").

York's rent regulatory scheme, but also the social and public policies upon which that scheme is based.

A. The Second Circuit's Decision Is Likely To Have A Significant And Broad-Based Impact On Local Rent Regulations

While this case involves only nine tenancies, under the rationale of the Second Circuit's holding, RTC could ultimately utilize Section 1821(e) to terminate tenancies in *all* rent-regulated units over which it acquires control.[12] While the precise number of rent-regulated units controlled by RTC (or FDIC) was apparently the subject of much controversy below, *see RTC v. Diamond*, 18 F.3d 111, 125 n.4 (2d Cir. 1994), the number clearly is significant and has been increasing steadily.

Should the decision below survive appeal, *Amici* would have grave concerns regarding when, where, and how RTC will exercise its newly minted and extraordinary power to repudiate statutory tenancies. Conceivably, thousands of low-income and moderate-income tenants across the country could find themselves without a home simply because RTC, in its sole discretion and "pursuant to an overarching mandate to 'maximize the net present value return' on assets in its possession," determines that their tenancies "are burdensome." *RTC*, 18 F.3d at 124.

While the Second Circuit evidenced concern for the potentially far-reaching social implications that its decision might have, in the end it found comfort in an RTC "Policy Statement" purporting to limit the agency's discretion in evicting low-income or moderate-income tenants. *RTC*, 18 F.3d at 125 n.5 ("any impact on tenants will be mitigated by RTC's express policy not to exercise its repudiation power with respect to families of low and moderate income").

However, since RTC's "Policy Statement" is simply an internally generated statement of guidelines that is not found in

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[12] As noted in Lillian Soloman's Petition, press reports indicate that RTC is already preparing to utilize the decision below to preempt rent control laws and evict tenants in Massachusetts, California, and Connecticut. *See 2nd Circuit Adds to Agency Power*, The Thrift Regulator, Mar. 14, 1994, at 3.

statute or regulation, it can be modified, revoked, or arguably even ignored at any time, and is not a meaningful constraint on RTC's discretion.[13] As the District Court in this case expressly recognized: "Since section 1821(e)(1) says nothing about income levels, if the section is interpreted to encompass the power to repudiate statutory tenancies, *the RTC would not be required to adopt the income exemptions* that it has in fact adopted in this case." *RTC v. Diamond*, 801 F. Supp. 1152, 1162 n.6 (S.D.N.Y. 1992) (emphasis added), *rev'd in relevant part*, 18 F.3d 111 (2d Cir. 1994).[14]

In other words, although the "Policy Statement" is in effect now and may for a time help mitigate the impact of the Second Circuit's holding on low-income and moderate-income tenants occupying rent-regulated housing, it is neither a guaranteed nor enforceable constraint on RTC's repudiation powers as the Second Circuit has construed them.[15] Accordingly, *Amici* submit that the Second Circuit's advertence to the "Policy Statement" as justifying its holding, is unwarranted.

B. The Decision Below Ignores Local Determinations Of Social Policy Long-Recognized As Important By This Court

This Court has long recognized that state and local rent regulatory schemes are not only a legitimate exercise of the states'

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[13] The RTC enabling statute provides for review of promulgated policy statements by a Thrift Deposit Protection Oversight Board, but nothing in the statute appears to require a similar review of any purported withdrawal or revocation of policy. *See* 12 U.S.C. §§ 1441a(a)(6)(A) & (b)(3)(B).

[14] *See also Employees' Retirement Sys. v. RTC*, 840 F. Supp. 972, 990 (S.D.N.Y. 1993) (refusing to credit RTC valuation policies because "the RTC . . . is at the controls, choosing to utilize this distorting method in those instances when its unfairness will redound to the RTC's favor and avoiding it . . . where its use would prejudice the RTC").

[15] *Amici* recognize that, pursuant to 12 U.S.C. § 1441a(b)(3)(C)(v), RTC is charged with "maximiz[ing] the preservation of the availability and affordability of residential real property for low- and moderate-income individuals." However, in light of what the Second Circuit described as RTC's "primary" and "overarching" mandate, which is to maximize recovery on assets, *see RTC*, 18 F.3d at 113, 124, this provision is apparently not sufficient to protect rent-regulated tenants from losing their homes.

historic police powers, but also that such ordinances generally serve important public and social policy interests. As the Court observed over 70 years ago:

> The warrant for this legislative resort to the police power was the conviction on the part of the state legislators that there existed in the larger cities of the state a social emergency, caused by an insufficient supply of dwelling houses and apartments, so grave that it constituted a serious menace to the health, morality, comfort, and even to the peace of a large part of the people of the state. That such an emergency . . . would sustain a resort, otherwise valid, to the police power for the purpose of dealing with it cannot be doubted, for, unless relieved, the public welfare would suffer in respects which constitute the primary and undisputed, as well as the most usual basis and justification, for exercise of that power.

Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242, 245 (1922).[16] It is precisely these type of public policy concerns upon which New York's long-standing rent control and rent stabilization systems are based. *See, e.g., Morse & Grossman, Inc. v. Acker & Co.*, 79 N.E.2d 258, 260 (N.Y. 1948) ("[t]he basic purpose of the emergency rent legislation was to protect tenants by placing a ceiling on rents and by preventing widespread evictions while the emergency . . . shortage of space continued").[17]

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[16] *See also Pennell v. City of San Jose*, 485 U.S. 1, 13 (1988) ("a primary purpose of rent control is the protection of tenants"); *Bowles v. Willingham*, 321 U.S. 503, 513 n.9 (1944) (one purpose of rent control is "to protect persons with relatively fixed and limited incomes, consumers, wage earners . . . from undue impairment of their standard of living"); *Block v. Hirsh*, 256 U.S. 135, 156 (1921) (in enacting rent control legislation, Congress "stated the unquestionable embarrassment of Government and danger to the public health in existing condition of things. . . . Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present").

[17] *See also Suppus v. Bradley*, 105 N.Y.S.2d 48, 50 (App. Div. 1951) ("[t]he primary aim of the Act referring to housing accommodations is . . . to protect tenants from eviction at a time when because of the housing shortage it is diffi-

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There is still an acute shortage of housing in New York City. In 1993, there were approximately 2.06 million rental units in New York City, only 70,000 of which were vacant and available for rent -- a vacancy rate of approximately 3.4%.[18] Perhaps more importantly, the vacancy rate for low-income housing (asking rents of less than $300) in 1993 was only 0.58%.[19] These vacancy rates are considerably less than the 5% rate that the legislature has deemed to constitute a "housing emergency." New York's rent control and rent stabilization systems are part of a comprehensive legislative effort to deal with this "housing emergency."[20] The decision below threatens seriously to hinder this effort.

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In sum, in evaluating the Petitions for Certiorari in this case, *Amici* respectfully request the Court to take into consideration the potentially enormous impact that the Second Circuit's decision might have on local housing markets generally, and on tenants of low and moderate means in particular. The public's interest in safe, affordable, and decent housing -- especially in areas where local legislatures have declared housing emergencies -- is too important a social policy to leave to the virtually unguided whim of federal agencies charged primarily with "maximizing" the value of government assets.

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[17](...continued)

cult, if not impossible, for them to get another place to live"); *Koppel v. Evelyn*, 145 N.Y.S.2d 213, 215 (City Mun. Ct. 1955) ("[t]he purpose and intent of the Emergency Rent Statute . . . is twofold; the protection of the occupancy of tenants in their housing accommodations and the control of the rent that may be charged and collected").

[18] *See Selected Findings of the 1993 Housing and Vacancy Survey*, prepared by Assistant Commissioner for Policy Analysis and Research, New York City Department of Housing Preservation and Development (Feb. 8, 1994) (hereinafter "*Selected Findings*").

[19] *See id.*

[20] Exacerbating the "housing emergency" and further highlighting the continuing need for rent regulation is the fact that real incomes of New York City tenants are on the decline. The median income of renters in New York City decreased 5% between 1990 and 1992 and now rests at $19,005. *See Selected Findings*. The proportion of renter households with incomes below the poverty level increased from 26.8% in 1990 to 29.9% in 1992. *See id.*

CONCLUSION

The decision of the Court of Appeals in this case completely ignored well-settled principles of statutory construction to the potential detriment not only of petitioners, but of thousands of rent-controlled tenants in New York City and across the country. In order to correct these errors, and to resolve the decisional conflicts that the Second Circuit's opinion creates, the writ should issue.

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